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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, *et al.*

Plaintiffs,

vs.

WILBUR ROSS, JR., *et al.*

Defendants.

CITY OF SAN JOSE, *et al.*

Plaintiffs,

vs.

WILBUR ROSS, JR., *et al.*

Defendants.

Case Nos. 3:18-cv-01865-RS,
3:18-cv-02279-RS

**COMMON CAUSE, TREVOR
POTTER, REP. JODY L.
MCNALLY, AND JUSTICE
ROBERT ORR (RET.)'S
MOTION FOR LEAVE TO FILE
BRIEF AS AMICI CURIAE IN
SUPPORT OF PLAINTIFFS'
POSITION AT TRIAL**

Date: February 1, 2019
Time: N/A
Judge: Honorable Richard Seeborg
Dept.: 3

COMMON CAUSE, TREVOR POTTER, REP. JODY L. MCNALLY, AND JUSTICE ROBERT ORR (RET.)'S MOTION FOR LEAVE TO FILE
BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' POSITION AT TRIAL

1 *Amici Curiae* Common Cause, Trevor Potter, Rep. Jody L. McNally, and Justice Rober Orr
 2 (Ret.) respectfully move this Court for leave to file the accompanying amicus brief in support of
 3 Plaintiffs' Position at Trial. In support of their motion, *amici* state as follows:

4 Common Cause is one of the nation's leading democracy organizations and currently has
 5 over 1.2 million members and supporters nationwide and local chapters in 25 states, including states
 6 that will be disproportionately impacted by the inclusion of a citizenship question on the 2020
 7 Census, including California, Colorado, Illinois, New York, Pennsylvania, Rhode Island, and Texas.
 8 Common Cause has been a leading advocate for policies that ensure a responsive and representative
 9 government. Common Cause has an interest in this case because it concerns how the 2020 Census
 10 will be conducted, which could have dramatic impacts on apportionment and representation.

11 Trevor Potter, Rep. Jody L. McNally, and Justice Robert Orr (Ret.) are current and former
 12 Republican officials (elected and appointed) with an interest in good government, appropriate
 13 apportionment, and representative democracy. These individuals have an interest in this case
 14 because of their status as current and former officials and specifically because issues of
 15 apportionment and representation are not partisan issues and should not be viewed as such.

16 *Amici* believe this brief will be helpful to the court in considering whether a violation of the
 17 Enumeration Clause and the Administrative Procedure Act occurred. In particular, this brief adds
 18 substantial historical information about the considerations and motivations informing the enactment
 19 of both the Enumeration Clause and the Fourteenth Amendment. It also adds helpful information
 20 about the impact of the addition of a citizenship question on communities—both urban and rural—
 21 with high numbers of non-citizen residents. It provides a non-partisan, democracy-focused view of
 22 why the question proposed by Secretary Ross harms a core commitment of our constitutional
 23 democracy.

24 Counsel for Plaintiffs the County of Los Angeles, the City of Los Angeles, the City of
 25 Fremont, the City of Oakland, the City of Long Beach, the City of San Jose, the Black Alliance for
 26 Just Immigration, and counsel for defendants have consented to the filing of this brief. Counsel to
 27 the remaining plaintiffs did not respond to a request for consent.

28 COMMON CAUSE, TREVOR POTTER, REP. JODY L. MCNALLY, AND JUSTICE ROBERT ORR (RET.)'S MOTION FOR LEAVE TO FILE
 BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' POSITION AT TRIAL

1 WHEREFORE, Common Cause, Trevor Potter, Rep. Jody L. McNally, and Justice Rober Orr
2 (Ret.) respectfully request that this Court grant them leave to file the proposed, attached *amici* brief.

3
4 Dated: January 31, 2019

5 /s/ Mary Kelly Persyn

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27 *Justice Robert Orr (Ret.)*

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**[PROPOSED] ORDER
GRANTING COMMON CAUSE,
TREVOR POTTER, REP. JODY
L. MCNALLY, AND JUSTICE
ROBERT ORR (RET.)'S
MOTION FOR LEAVE TO FILE
BRIEF AS AMICI CURIAE IN
SUPPORT OF PLAINTIFFS'
POSITION AT TRIAL**

Date: February 1, 2019
Time: N/A
Judge: Honorable Richard Seeborg
Dept.: 3

[PROPOSED] ORDER GRANTING COMMON CAUSE, TREVOR POTTER, REP. JODY L. MCNALLY, AND JUSTICE ROBERT ORR (RET.)'S MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' POSITION AT TRIAL

Case Nos. 3:18-cv-01865-RS, 3:18-cv-02279-RS

1 Now, therefore, it is hereby ORDERED that:

2 Upon consideration of Common Cause, Trevor Potter, Rep Jody L. McNally, and Justice
3 Robert Orr (Ret.)'s Motion for Leave to File Brief as *Amici Curiae* in Support of Plaintiffs' Position
4 at Trial, the Court finds that the proposed *amici curiae* brief may assist in the determination of the
5 matters before this Court.

6 *Amici* are granted leave to file their brief.

7

8 Dated: _____, 2018

9

HON. RICHARD SEEBORG
United States District Judge

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28 [PROPOSED] ORDER GRANTING COMMON CAUSE, TREVOR POTTER, REP. JODY L. MCNALLY, AND JUSTICE ROBERT ORR
(RET.)'S MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' POSITION AT TRIAL

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on February 1, 2019. I further certify that counsel of record for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 1st day of February, 2019.

/s/ Mary Kelly Persyn
Mary Kelly Persyn

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**BRIEF OF COMMON CAUSE,
TREVOR POTTER, REP. JODY
L. MCNALLY, AND JUSTICE
ROBERT ORR (RET.) AS *AMICI
CURIAE* IN SUPPORT OF
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6	http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/	5
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INTEREST OF *AMICI CURIAE*

Amicus curiae Common Cause was founded by John Gardner in 1970 as a nonpartisan “citizens lobby” whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the nation’s leading democracy organizations and currently has over 1.2 million members and supporters nationwide and local chapters in 25 states, including states that will be disproportionately impacted by the inclusion of a citizenship question on the 2020 Census, including California, Colorado, Illinois, New York, Pennsylvania, Rhode Island, and Texas. Common Cause has been a leading advocate for policies that ensure a responsive and representative government.

Common Cause filed an *amicus* brief in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). Common Cause also recently filed an *amicus* brief in litigation in the U.S. District Court for the Southern District of New York concerning Secretary Ross’s decision to include a citizenship question on the 2020 Census. *New York v. U.S. Department of Commerce (New York)*, Nos. 18-CV-2921 & 18-CV-5025, 2019 U.S. Dist. LEXIS 6954 (S.D.N.Y. Jan. 15, 2019). Additionally, Common Cause is a leading organization challenging the practice of partisan gerrymandering. Common Cause is the lead plaintiff in the challenge to the congressional gerrymander in North Carolina that will be argued before the Supreme Court this March. *Rucho, et al. v. Common Cause, et al.*, No. 18-422, *consideration of appellate jurisdiction postponed to hearing on merits*, 586 U.S. --- (Jan. 4, 2019) (appealing the three-judge district court’s decision in *Common Cause et al. v. Rucho et al.*, 1:16-CV-1026 (M.D.N.C.)).

Amicus curiae Trevor Potter is a former Republican Chairman of the Federal Election Commission. He is one of the country’s most prominent and experienced campaign and election lawyers, and served as general counsel to John McCain’s 2000 and 2008 presidential campaigns. Mr. Potter is currently the President of the Campaign Legal Center, a nonprofit nonpartisan organization that fights the current threats to our democracy in the areas of campaign finance, voting rights, redistricting, and ethics. Mr. Potter has long been engaged with good government issues and has served as *amicus curiae* in a number of cases.

1 *Amicus curiae* Representative Jody L. McNally is a Republican representative in the
 2 Strafford 10 district in the New Hampshire House of Representatives. As an elected representative,
 3 she has a vested interest in ensuring a full and accurate count in the 2020 Census.

4 *Amicus curiae* Justice Robert Orr is a retired Associate Justice of the North Carolina Supreme
 5 Court. Justice Orr was elected as a Republican to the Supreme Court and is a former Republican
 6 candidate for governor of North Carolina. After retiring from the Supreme Court, Justice Orr headed
 7 the North Carolina Institute for Constitutional Law. Justice Orr has also served on the United States
 8 National Park System Advisory Board, as an adjunct faculty member at North Carolina Central
 9 University (“NCCU”), and as a member of the Board of Visitors for NCCU’s Law School. A former
 10 justice and a constitutional scholar, Justice Orr is dedicated to the rule of law and the preservation of
 11 our system of representative government.

12 **ARGUMENT**

13 In our constitutional democracy, *all* persons who reside within the United States—including
 14 non-citizens—are granted the equal right to be represented by a member of Congress. This core
 15 constitutional principle is as old as our democracy itself. The Founders introduced it in Article I,
 16 Section 2 of the Constitution, and the country reaffirmed and perfected it in the Fourteenth
 17 Amendment. Although the right to vote in federal elections has expanded over time, it has always
 18 been the case that the right to representation in Congress belongs to persons, not to voters or citizens.

19 The primary constitutional purpose of the census is to ensure that our constitutional
 20 commitment to equal representation of all persons is fully realized. Nevertheless, Secretary Ross has
 21 decided to include a citizenship question on the 2020 Census, despite—or, perhaps, precisely
 22 because of—the fact that doing so will cause undercounts in areas with large non-citizen
 23 populations. This, in turn, will mean that states—California, particularly—stand to lose
 24 representation in Congress based on the undercounting of certain demographic groups, *see New*
 25 *York*, 2019 U.S. Dist. LEXIS 6954, at *241 (“[T]he Court finds by a preponderance of the evidence
 26 that California residents face a certainly impending loss of representation in the House of
 27 Representatives.”), and that areas with large non-citizen populations—again, like California—will
 28 not receive their fair share of federal attention and resources, *see id.* at *246 (“[T]he Court finds

1 that . . . California . . . will lose some amount of federal funding as a result of the addition of the
2 citizenship question.”).

3 In denying motions to dismiss and motions for summary judgment on Plaintiffs’ claims, this
4 Court reasoned that while “demographic questions have long been a part of the enumeration process
5 since its inception,” the claims survived because “there may be a rare question that is so uniquely
6 impactful on the process of counting itself, that it becomes akin to a mechanics-of-counting-type
7 challenge.” Order Denying Motions to Dismiss at 27-28, *California v. Ross*, 18-cv-01865-RS, slip
8 op. at 26-28 (N.D. Cal August 17, 2018) (ECF No. 75). In reaching a final disposition on the merits
9 of this case, the Court should consider not only the uniquely harmful impact of the citizenship
10 question, but also the constitutional purpose of Article I, Section 2. Secretary Ross’s failure to
11 account for the risk that including a citizenship question on the 2020 Census would undermine the
12 fundamental constitutional principle of equality of representation is an important reason that his
13 decision to add the question violates both the Enumeration Clause and the Administrative Procedure
14 Act (“APA”). Because Secretary Ross’s decision would undermine a core constitutional
15 commitment without any reasoned explanation for doing so, it violates both the Enumeration Clause
16 and the substantive and procedural protections of the APA. The core constitutional value embodied
17 in Article I, Section 2, the right to equal representation—“the right to be counted and
18 represented”¹—should inform the district court’s analysis of the claims in this litigation.

19 **I. EQUAL REPRESENTATION OF PERSONS IS THE CORE CONSTITUTIONAL VALUE OF ARTICLE I,**
20 **SECTION 2 AS AMENDED BY THE FOURTEENTH AMENDMENT.**

21 **A. The Founders agreed that all persons—not just citizens—must be included in**
22 **the representation base for members of Congress.**

23 Equal representation of all persons in the United States is, and has always been, a
24 foundational principle of our republican system of government. The Founders firmly believed that
25 all persons living in the United States must be included in the representation base for Congress.
26 They enshrined this belief in Article I, Section 2 of the Constitution, which apportions congressional
27 representatives based on an “actual Enumeration” of the residents of each state.

28 ¹ *Fed’n for Am. Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge district court) (quoting 86 Cong. Rec. 4372 (1940)).

1 The Founders disagreed on a great many things. The process of debating and ratifying the
 2 Constitution was tumultuous, discordant, and heavily politicized. *See generally* MICHAEL J.
 3 KLARMAN, *THE FRAMERS' COUP* (2016). But the Founders were in accord on one very important
 4 thing: that members of Congress should represent *all* of the persons within their districts—not just
 5 citizens, and not just voters. *See Evenwel*, 136 S. Ct. at 1132 (“As the Framers of the Constitution
 6 and the Fourteenth Amendment comprehended, representatives serve all residents, not just those
 7 eligible or registered to vote.”); *see also* GORDON S. WOOD, *THE CREATION OF THE AMERICAN*
 8 *REPUBLIC, 1776-1787*, at 170 (2d ed. 1998) (Of all “the electoral safeguards for the representational
 9 system,” none “was as important to Americans as equality of representation.”).

10 John Adams, a Federalist, and Thomas Jefferson, a Democratic Republican, agreed that
 11 equality of representation was a core principle of the new American political order. *See* John Adams,
 12 Letter to Joseph Hawley (Aug. 25, 1776), quoted in *FOUNDING FAMILIES: DIGITAL EDITIONS OF THE*
 13 *PAPERS OF THE WINTHROPS AND THE ADAMSES* (C. James Taylor ed., 2015) (“Equality of
 14 Representation in the Legislature, is a first Principle of Liberty, and the Moment, the least departure
 15 from such Equality takes Place, that Moment an Inroad is made upon Liberty.”); Thomas Jefferson,
 16 Letter to William King (1819), Jefferson Papers, Library of Congress, Vol. 216, p. 38616 (“Equal
 17 representation [was] so fundamental a principle in a true republic that no prejudice [could] justify its
 18 violation . . .”). Alexander Hamilton likewise said, “[t]here can be no truer principle than this—that
 19 every individual of the community at large has an equal right to the protection of government.”
 20 *Evenwel*, 136 S. Ct. at 1127; *see also New York*, 2019 U.S. Dist. LEXIS 6954, at *275 n.49.

21 This foundational principle of representational equality ultimately found its way into Article
 22 I, Section 2 of the Constitution, which provides that “Representatives . . . shall be apportioned
 23 among the several States which may be included within this Union, according to their respective
 24 Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths
 25 of all other Persons.” U.S. CONST. art. I, § 2, cl. 3; *see also Wesberry v. Sanders*, 376 U.S. 1, 18
 26 (1964) (stating that “equal representation for equal numbers of people” is “the fundamental goal for
 27 the House of Representatives”). Obviously and infamously, the Constitution as originally drafted, in
 28 distinguishing between “free Persons” and “all other Persons” and thereby ratifying slavery, fell

woefully short of giving full effect to the principle. But even as written, Article I, Section 2 of the Constitution bases political representation on an individual's status as a "Person"—not as a citizen or a voter.

B. The Constitution resolves the tension between the broad right to equal representation and the then-narrow right to vote by distinguishing between those who can vote and those who are counted for census purposes.

Although the original Constitution provided for a broad right to representation for free persons, it did not give every free person the right to vote. Rather, the Constitution envisioned a system where a limited subset of all persons would vote for the representatives who would represent all (free) persons. *See Evenwel*, 136 S. Ct. at 1127 (“[T]he basis of *representation* in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives.”); *id.* at 1129 (“[I]t remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.”).

The Founders frankly did not believe in the principle of universal enfranchisement. They limited the franchise to adult white males who satisfied various state-imposed religious tests and property requirements—amounting to only about 10%–20% of the total national population at the time. Richard Briffault, *Legal History: The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1510 (2002); CONSTITUTIONAL RIGHTS FOUND., *Who Voted in Early America?*, BILL OF RIGHTS IN ACTION (Fall/Winter 1991). Even today, many persons who reside in the United States cannot vote. For instance, many states permanently disenfranchise people with prior felony convictions. Minors cannot vote. Non-citizen immigrants who are authorized to be in the United States for work or education cannot vote in federal elections. Nor can the 11 million undocumented immigrants who live here. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/>.

Despite having unjustly limited views of the right to vote, the Founders believed that all persons, voters or non-voters, deserved representation in Congress. As James Madison wrote in *The*

1 *Federalist*,

2 It is a fundamental principle of the proposed Constitution, that as the
3 aggregate number of representatives allotted to the several States is to
4 be determined by a federal rule, founded on the aggregate number of
5 inhabitants, so the right of choosing this allotted number in each State
is to be exercised by such part of the inhabitants as the State itself may
designate.

6 THE FEDERALIST No. 54 (James Madison); *see also Evenwel*, 136 S. Ct. at 1127. Thus,
7 representatives would be apportioned based on the state’s “aggregate number of inhabitants,” while
8 the state itself would decide which particular “part of the inhabitants” would be permitted to vote for
9 those representatives.

10 The Founders included this concept in Article I by providing that those who cast their ballots
11 as “Electors” do so on behalf of the broader “People”:

12 The House of Representatives shall be composed of Members chosen
13 every second Year by the People of the several States, and the Electors
14 in each State shall have the Qualifications requisite for Electors of the
most numerous Branch of the State Legislature.

15 U.S. CONST., art. 1, § 2, cl. 1 (emphasis added). *Cf. Evenwel*, 136 S. Ct. at 1132 (“By ensuring that
16 each representative is subject to requests and suggestions from the same number of constituents,
17 total-population apportionment promotes equitable and effective representation.”); *Shaw v. Reno*,
18 509 U.S. 630, 648 (1993) (congressional representatives are “obligat[ed]” to “represent . . . their
19 constituency as a whole”). By permitting states to determine who shall qualify as an “Elector,”
20 while also apportioning representation uniformly based on the number of “People,” the Constitution
21 therefore provides for a hybrid system of representation.

22 **C. The Fourteenth Amendment reaffirmed the representation of all persons as a**
23 **foundational principle of our democracy.**

24 The Fourteenth Amendment, which amended Article I, Section 2, reaffirmed and perfected
25 the principle of representational equality. *See id.* at 1128–29. The first sentence of the Fourteenth
26 Amendment defines “citizen.” U.S. CONST. amend. XIV, § 1. The next sentence contains the Equal
27 Protection Clause, which protects “any person within [the] jurisdiction [of the states].” *Id.* This
28 juxtaposition makes clear that the Equal Protection Clause protects “all *persons* within [a state’s]

territorial jurisdiction,” and “is not confined to the protection of citizens.” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added). The Fourteenth Amendment went on to replace Article I, Section 2’s reference to “the whole Number of free Persons” in the state with “the whole number of persons” in the state. In reaffirming and expanding the principle of representation for “persons” in the same breath that it provided a new definition of “citizens,” the Fourteenth Amendment unmistakably provides that the right to political representation flows to persons, not citizens.

This reaffirmation was intentional. During the debates over the Fourteenth Amendment, many in Congress sought a drastic change in our constitutional principles of equal representation, arguing that only citizens or voters should be counted in determining representation. *See Evenwel*, 136 S. Ct. at 1128. But, in the end, the Amendment retained—with its framers’ and ratifiers’ full awareness of the available alternatives—the commitment to apportionment based on total population. *See id.* (“The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base.”). The Framers of the Fourteenth Amendment decisively rejected apportionment based on a privileged subset of the whole population, choosing to cement the Constitution’s commitment to apportionment based on total population, without regard to citizenship or enfranchisement. *See id.* (quoting Senator Jacob Howard introducing the final version of the Amendment: “[The] basis of representation is numbers . . . this is the theory of the Constitution.”).

II. CENSUS RESULTS DRIVE BOTH POLITICAL REPRESENTATION AND FUNDING FOR LARGE GROUPS OF PEOPLE IN BROAD AREAS.

Because the enumeration of all persons is so fundamental to our system of representational equality, census results inevitably drive political representation and government policymaking. *See* Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. (forthcoming 2019) at 20 (“The enumeration drives the apportionment of congressional districts; redistricting for federal, state, and local districts of all kinds; and the distribution of billions of dollars in government grants tied by formula to population. Communities that are undercounted lose political voice and substantial government aid.”). Each year, census results are used to allocate more than \$600 billion in funding to over a hundred federal programs, including programs for healthcare, nutrition assistance, highway

1 planning and construction, student financial aid, housing assistance, and childcare. U.S. CENSUS,
 2 USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION 3-8 (2017), *available at*
 3 [https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-](https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf)
 4 [papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf).

5 When fear and distrust depress the census response in some areas more than others, those
 6 areas in which the response has been reduced lose political clout as well as funding for local
 7 programs, hurting long-time residents, citizens, and newly arrived immigrants. Differential
 8 undercounts do not merely impact undocumented individuals, or lawful permanent residents, or
 9 minority citizens; everyone in an area with depressed census participation also loses clout and cash.
 10 Adding a citizenship question to the 2020 Census will cause an undercount in any community that
 11 thrives because of non-citizens by depressing response rates—whether that area is an urban minority
 12 community or a rural area dependent on immigrant farm laborers .

13 Of course, the vast majority of non-citizens reside in cities and large urban areas, which are
 14 magnets for immigrants drawn to build new lives in this country. *See, e.g.*, U.S. CENSUS, FOREIGN-
 15 BORN: 2014 CURRENT POPULATION SURVEY DETAILED TABLES tbl.1.1 (2014), *available at*
 16 <https://www.census.gov/data/tables/2014/demo/foreign-born/cps-2014.html>. The concentration of
 17 foreign-born residents in cities and urban areas is almost always greater—sometimes vastly
 18 greater—than the concentration in the rest of the states in which they are situated. Cities need
 19 representation commensurate with their population in order to ensure they receive their fair share of
 20 federal resources so that they can provide the services their many residents require.

21 But many rural communities are also home to a disproportionate number of non-citizens,
 22 millions of whom work as agricultural laborers. In fact, the vast majority—approximately 73%—of
 23 America’s agricultural laborers are foreign-born. *National Demographic Characteristics*, U.S.
 24 DEP’T OF LABOR, [https://www.doleta.gov/naws/pages/research/docs/](https://www.doleta.gov/naws/pages/research/docs/Table1.NAWS_National_Demographics.xlsx)
 25 [Table1.NAWS_National_Demographics.xlsx](https://www.doleta.gov/naws/pages/research/docs/Table1.NAWS_National_Demographics.xlsx) (last visited Oct. 15, 2018). Adding a citizenship
 26 question to the 2020 Census would undoubtedly harm the rural communities in which these
 27 agricultural laborers live. Levitt, *supra*, at 21.

28 The state of California, which contains both of these kinds of areas, provides an illuminating

example. Its major cities such as Los Angeles and Oakland contain huge immigrant non-citizen populations. Its rural areas such as the Central Valley are heavily dependent on immigrant or migrant farmworkers, predominantly from Mexico.² If the 2020 Census count is not accurate, California stands to lose federal aid and congressional seats.

New Hampshire is another illustrative example. Approximately 37% of New Hampshire residents live in rural communities.³ Additionally, for smaller states, such as New Hampshire, domestic migration patterns can have an outsized effect. Among the states east of the Mississippi River, New Hampshire has the second largest percentage of residents that were not born in the state in the United States.⁴ An accurate census count is essential to track population changes and ensure that New Hampshire is receiving the federal funding it needs to serve its residents. New Hampshire counts on over \$2 billion dollars per year that is based on census data, amounting to \$1,590 per capita.⁵ Even in smaller states, an undercount would have an outsized impact.

Adding a citizenship question to the 2020 Census will result in a differential undercount in areas with large non-citizen populations—whether those areas are cosmopolitan metropolises with vibrant immigrant communities, or rural areas dependent on foreign-born agricultural labor. This will cause these areas to lose ground in the competition for federal resources, depriving their residents of vital services and programs, and hurting everyone who lives there in the process.

III. SECRETARY ROSS’S FAILURE TO CONSIDER THE RISK THAT INCLUDING A CITIZENSHIP QUESTION ON THE 2020 CENSUS WOULD UNDERMINE EQUALITY OF REPRESENTATION CONFIRMS THAT HIS DECISION TO ADD THE QUESTION VIOLATES THE ENUMERATION CLAUSE AND THE ADMINISTRATIVE PROCEDURE ACT.

A. Being counted, and being included in the apportionment process, is integral to the fundamental right to political representation.

As discussed above, the history of Article I and the Fourteenth Amendment demonstrates that

² See, e.g., UNIV. OF CAL. AGRIC. ISSUES CTR., AGRICULTURAL WORKFORCE (2009), *available at* https://www.cdfa.ca.gov/agvision/docs/Agricultural_Workforce.pdf.

³ See, e.g., *Rural Health for New Hampshire*, RURAL HEALTH INFO. HUB (June 5, 2017), <https://www.ruralhealthinfo.org/states/new-hampshire>.

⁴ See, e.g., Michael Kitch, *State’s Population Growth All Depends on Migration*, N.H. BUS. REV. (Sept. 13, 2018), <https://www.nhbr.com/September-14-2018/States-population-growth-all-depends-on-migration/>.

⁵ See, e.g., REAMER, *supra* note **Error! Bookmark not defined.** (data for New Hampshire), *available at* <https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/New%20Hampshire%20CFD%2008-18-17.pdf>.

1 the concern animating both the enactment and the subsequent modification of the Enumeration
 2 Clause is that all persons living in the United States be counted for the purposes of apportionment.
 3 This core constitutional commitment is embodied in Article I, Section 2 and the Fourteenth
 4 Amendment, which provide that representatives and direct taxes be apportioned based on “the whole
 5 number of persons.” U.S. CONST. amend. XIV, § 2 (modifying U.S. CONST. art. I, § 2, cl. 3).
 6 Because this value is embodied directly in the text of the Constitution,⁶ both as ratified at the
 7 Founding and as improved by the Fourteenth Amendment, it should be treated as a foundational right
 8 worthy of protection. *Cf. New York*, 2019 U.S. Dist. LEXIS 6954, at *275 n.49 (explaining that the
 9 “Article III injury that a person suffers when his or her state loses a representative in congressional
 10 reapportionment, ultimately traces to a legally protected interest that does not depend on that
 11 person's citizenship status or eligibility to vote” because there is an injury to the “representational
 12 rights of every individual of the community at large,” regardless of eligibility to vote).

13 The right to be counted, and thereby to be represented in our constitutional system, is no less
 14 important than the other “fundamental rights” that the Court has sought to protect. For instance, in
 15 *Harper v. Virginia Board of Elections*, the Supreme Court concluded that a denial of the right to vote
 16 on the basis of indigency (an unprotected class in other contexts⁷) was an equal protection violation
 17 because it implicated a “fundamental right” explicitly protected by the Constitution. 383 U.S. at
 18 667. As discussed above, the right to be counted, and thereby represented, is as essential for non-
 19 citizens as the right to vote is for citizens. It works to further their interests and guarantee that their
 20 voices are heard. In *Shapiro*, the Supreme Court concluded that strict scrutiny was warranted not
 21 based on the nature of the classification being made, but rather based on the foundational nature of
 22 the right in question: the right to interstate travel. *See* 394 U.S. at 629-30. In *Skinner*, the Court
 23 concluded that strict scrutiny was warranted because the legislation at issue touched on “[m]arriage
 24 and procreation,” which are “one of the basic civil rights of man” and “fundamental to the very

25 _____
 26 ⁶ *Cf. Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (“[T]he Constitution does not provide judicial remedies for
 every social and economic ill. We are *unable to perceive in that document* any constitutional guarantee of
 access to dwellings of a particular quality.” (emphasis added)).

27 ⁷ *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (“We have previously rejected the suggestion
 28 that statutes having different effects on the wealthy and the poor should on that account alone be subjected to
 strict equal protection scrutiny.”).

1 existence and survival of the race.” 316 U.S. at 541.

2 The right to be counted is the essential right for representation in American government, and
3 it has clear roots in the text of the Constitution. It is, therefore, a fundamental constitutional right.
4 Secretary Ross’s decision to include a citizenship question in the on the 2020 Census violates that
5 fundamental constitutional right, and thereby violates the Enumeration Clause.

6 **B. Secretary Ross’s decision to add the citizenship question—and thereby**
7 **undermine a core constitutional commitment—violates both the substantive and**
8 **procedural protections of the APA.**

9 The Court’s analysis of Plaintiffs’ APA claims should be informed by the Secretary’s failure
10 to adequately consider the way that his decision undermines the core constitutional commitment to
11 representational equality. By willfully turning a blind eye to the constitutional issues with his
12 decision to add the citizenship question to the 2020 Census, Secretary Ross violated both the
13 procedural and substantive requirements of the APA.

14 As Plaintiffs articulate, the Secretary’s politically motivated decision did not consider the
15 relevant data or articulate a satisfactory explanation. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*
16 *Auto Ins. Co. (State Farm)*, 463 U.S. 29, 43 (1983). His explanation for the decision—that it would
17 aid in enforcement of the Voting Rights Act (“VRA”)—was irrational, because to the contrary it
18 would undermine representation of those whom the VRA is intended to protect. *See id.* (an agency
19 may not make a “decision that runs counter to the evidence”); *see also New York*, 2019 U.S. Dist.
20 LEXIS 6954, at *376 (“[I]n a startling number of ways, Secretary Ross’s explanations for his
21 decision were unsupported by, or even counter to, the evidence before the agency.”); *id.* at *386
22 (“[T]here was no evidence in the Administrative Record that would support a finding that more
23 granular CVAP data is ‘necessary’ for enforcement of the VRA and plenty of evidence to the
24 contrary.”). It was also pre-textual, as demonstrated by the Secretary’s now-admitted conversations
25 with anti-immigrant advisors to the President, Steve Bannon and Kris Kobach. *See id.* at *404
26 (“[T]he evidence is clear that Secretary Ross’s rationale was pretextual.”). A decision that lacks a
27 coherent rationale violates the APA. *See, e.g., State Farm*, 463 at 43–44. So too does a decision that
28 violates the APA to “entirely fail[] to consider an important aspect of the problem”).

Based on the pre-trial record, it is evident that the Secretary’s stated rationale of enforcing the VRA is a mere pretext to obscure his actual purpose: artificially depressing the response rate of both documented and undocumented immigrants, and diminishing the representation and provision of government services to the communities in which they live. *Cf. Utah v. Evans*, 536 U.S. at 500-01 (Thomas, J., concurring in part and dissenting in part) (“The Framers knew that the calculation of populations could be and often were skewed for political or financial purposes. Debate about apportionment and the census consequently focused for the most part on creating a standard that would limit political chicanery.”). To achieve this political objective, Secretary Ross sought to undermine the core constitutional principle embodied in the Enumeration Clause.

In analyzing Plaintiffs’ APA claims, the Court should weigh the Secretary’s intentions to directly undermine this core constitutional value. Here, the intended attack on a core constitutional principle that guided the Secretary’s decision to add the citizenship question gives additional weight to the already persuasive evidence supporting a finding that the decision violated the APA because the decisionmaking process was marred by bad faith. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (explaining that, while “inquiry into the mental processes of administrative decisionmakers is usually to be avoided,” “[t]he court may require the administrative officials who participated in the decision to give testimony explaining their action,” where there is either “a strong showing of bad faith” or there have been no “formal findings” such that “the only way there can be effective judicial review is by examining the decisionmakers themselves”), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Had the Secretary engaged in that undertaking in good faith—looking at the core constitutional objective furthered by the census and the past practices and legislative enactments that have sought to effective it—there would have been no possible conclusion that he could have drawn except that the addition of this question to the census would likely undermine the primary purpose of the census, a core constitutional objective, the accurate accounting of the entire population of people living within the United States.

CONCLUSION

The Court should enjoin Secretary Ross’s decision to add the unnecessary citizenship question to the 2020 Census because it violates both the Enumeration Clause and the procedural and

substantive requirements of the APA. As described here, Secretary Ross’s decision is inconsistent with the values enshrined in the Constitution by the Founders and reaffirmed by the Congress that enacted the Fourteenth Amendment. The addition of this question will depress representation of communities in California—both urban and rural—with significant immigrant populations that deserve to be adequately represented. Further, it undermines the core constitutional value that the Enumeration Clause of Article I, Section 2 seeks to protect. The Court’s analysis should be informed by the unavoidable reality that Secretary Ross’s decision will undermine the very purpose for which the Census exists, namely the “actual Enumeration” of “the whole number of persons in each state.” U.S. CONST. art. 1, § 2, cl. 3; *id.* amend. XIV, § 2. Even if the court finds that the challenged question does not have such an unusual impact that it violates the Enumeration Clause, the principles embodied in Article I, Section 2 should nonetheless inform the Court’s decision in favor of Plaintiffs.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on February 1, 2019. I further certify that counsel of record for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 1st day of February, 2019.

/s/ Mary Kelly Persyn
Mary Kelly Persyn